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Client Alert: OSHA's Proposed Silica Rule now Published in Federal Register

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OSHA's proposed silica rule, supported by 800 pages of background information and scientific literature, was published in the Federal Register on September 12, 2013. The comment period, which commences with this date of publication, will last 90 days (i.e., until December 11, 2013). Hearings will begin on March 4, 2014.

The *proposed* PEL is 50 $\mu\text{g}/\text{m}^3$ over an average 8-hour time period for all three types of crystalline silica: quartz, cristobalite and tridymite. This is a decrease by half of the current PEL of 100 $\mu\text{g}/\text{m}^3$ for crystalline silica, in general. For the construction industry, the decrease is greater, as the current PEL for the construction industry is the equivalent of 250 $\mu\text{g}/\text{m}^3$. An action level will be established at or above 25 $\mu\text{g}/\text{m}^3$ over an average 8-hour time period, which triggers requirements for periodic exposure assessments. The proposed rule, thus, is a substantial decrease in the PEL with notable implications for the construction industry as well as the hydraulic fracturing industry. It may be expensive for smaller businesses to implement. OSHA estimates that the proposed rule will cost \$637 million annually for compliance and average \$1,200 in annual costs per affected entity.

Importantly, OSHA notes that respirators, alone, are insufficient to achieve compliance. Engineering and work practice controls to reduce exposure are required. Requirements under the proposed rule include, among others, the following:

- exposure assessments every three months if at or above PEL;
- mandatory use of engineering and work practice controls to reduce respirable crystalline silica below PEL, unless employer can show that such methods are not feasible;
- requiring no-cost medical surveillance for any employee exposed to silica above the PEL for 30 or more days per year and timely provision of medical opinions to employees; and
- mandating record-keeping and retention of employee exposure (including air monitoring data) and medical records for a 30-year period.

It has been predicted over a number of years that this proposed rule will face legal challenges as various industry and scientific experts fight over whether the “science” supports the cost of imposing exposure more stringent limit. The proposed rule includes numerous articles intended to substantiate the reasoning for the decreased proposed PEL. Regardless of how any such challenges are resolved, employers should be aware of the risks that silica exposure creates for their employees and the potential costs that periodic monitoring and engineering controls may impose on their operations.